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No. 90-235

In the Supreme Court of the United States

OCTOBER TERM, 1990

WASTE CONTRACTORS, INC., PETITIONER

v.

LAUDERDALE COUNTY COMMISSION AND THE STATE OF ALABAMA, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR THE PETITIONER

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Respondent Lauderdale County Commission does not take issue with any of the propositions set forth in our certiorari petition. It does not attempt to defend the Alabama Supreme Court's rationale for rejecting petitioner's procedural due process claim. It does not dispute that the Alabama Supreme Court's disposition of the due process claim conflicts with decisions of other federal courts of appeals and state supreme courts. Finally, respondent does not try to counter our showing that the questions presented in the petition involve issues of considerable importance.

Rather than defending the Alabama Supreme Court's decision on its own terms, the Commission advances a variety of other reasons why certiorari supposedly is inappropriate in this case. None of respondent's contentions provides the slightest justification for letting the decision below stand. Certio-

rari is clearly warranted to correct the Alabama Supreme Court's flawed due process analysis.

1. Respondent argues that the landfill license granted to petitioner Waste Contractors, Inc. (WCI), did not amount to a property interest protected by the Due Process Clause and that the revocation of that license accordingly did not implicate the due process guarantee. Both the Alabama Supreme Court and the Alabama Court of Civil Appeals rejected these very arguments, however, concluding that the revocation of the landfill license *did* violate petitioner's due process rights. See Pet. App. 8a-9a; 17a-18a.[1] Respondent's contentions are meritless.

First, respondent asserts (Br. in Opp. 9-13) that the landfill license was invalid because it was procured by fraud. These same allegations formed the basis of the State of Alabama's motion for summary judgment on grounds of unclean hands, laches and estoppel. See R. 187-206; 185-186. Following an argument before the trial court at which WCI opposed the State's motion, the motion was denied. Pet. App. 25a. Lauderdale County then advanced the same contention before the Alabama Court of Civil Appeals in support of its assertion that WCI had no constitutionally protected property interest in the landfill license. See Lauderdale County Ct. Civ. App. Br. 23-24. Although the appellate court did not specifically address the issue, it necessarily rejected the fraud claim because it found that WCI's due process rights had been violated and entered judgment in

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[1] Respondent presented these precise arguments in its briefs to these courts. See Lauderdale County Ct. Civ. App. Br. 23-26; Lauderdale County Br. in Support of Pet. for Cert. 25-29.

favor of WCI. Pet. App. 17a-18a. The Alabama Supreme Court agreed that petitioner had a protected property right. *Id.* at 8a-9a. In sum, the fraud argument (which raises only a question of state law) has been squarely rejected by the Alabama courts and therefore provides no basis for denying WCI's due process claim.[2]

Second, respondent contends (Br. in Opp. 13-17) that the landfill license is not a constitutionally protected property interest because WCI's investment in the landfill site was too small and WCI did not obtain a landfill permit from the Alabama Department of Environmental Management (ADEM). These assertions are legally irrelevant.

Contrary to respondent's apparent belief, WCI was not required to take any additional steps in order to "qualify" the landfill license for protection under the Due Process Clause. The Due Process Clause protected Waste Contractors' landfill license because the license itself was an interest as to which Waste Contractors had a "legitimate claim of entitlement." *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578

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[2] Respondent invokes *Codd* v. *Velger*, 429 U.S. 624 (1977), but in this case WCI responded to the fraud allegation *and* prevailed in the lower courts. WCI's full response to the fraud allegation appears in its brief in the Alabama Supreme Court (at 22-24). Basically, the different representations regarding the volume of waste to be disposed of in the landfill were made in response to entirely different inquiries. The smaller number—350 tons per day—is the level at which WCI anticipates operating the landfill. The larger number was provided in response to a request by the ADEM for the maximum daily disposal limit; it does not reflect the planned operational level. There was thus no fraud whatever in WCI's representations to the Lauderdale County Commission.

(1972); see also Pet. 7. This Court in *Bell* v. *Burson*, 402 U.S. 535 (1971), did not inquire whether Mr. Bell had purchased a car before concluding that his driver's license was property protected by the Due Process Clause. Here, the landfill license itself plainly amounted to a property interest protected by the Due Process Clause. Indeed, the Alabama courts recognized that fact by holding that the revocation of the license deprived WCI of its property in violation of the Due Process Clause.[3]

2. Next, respondent asserts (Br. in Opp. 18-24) that the enactment of the Solid Waste Management Plan, Ala. Code § 22-27-40 *et seq.*, moots this action because the statute imposes a moratorium on the issuance of new landfill licenses and prescribes criteria to govern permit proceedings upon the termination of the moratorium. The flaw in this argument is that Waste Contractors is not seeking a new license; it is seeking to invalidate the revocation of the license it was granted on April 14, 1987. Because the new

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[3] There is no rule requiring "substantial expenditures" (Br. in Opp. 13) in order to create a property right for purposes of the Due Process Clause. *Keiger* v. *Winston-Salem Board of Adjustment*, 190 S.E.2d 175 (N.C. 1972), holds merely that North Carolina law requires such expenditures to create a "vested right"; the case has nothing to do with Alabama law or procedural due process. *Four Seasons Apartment* v. *City of Mayfield Heights*, 775 F.2d 150 (6th Cir. 1985), rests not on the absence of substantial expenditures, but on the expiration of a building permit for lack of use. In any event, WCI clearly did make substantial expenditures in reliance on its landfill license. Cf. *Kasparek* v. *Johnson County Board of Health*, 288 N.W.2d 511, 518 (Iowa 1980) ($13,000 expenditure developing property gave owners a vested right to a sewer permit that could not be disturbed by subsequent regulation without compensation).

statute, which applies only to the issuance of new licenses, did not become effective until two years later—on May 16, 1989—that statute obviously could not affect the validity of the 1987 license.

Respondent may be arguing that the statute moots this action because WCI never obtained a permit from the ADEM and, under the new statutory scheme, the ADEM may issue a permit only if the applicant first obtains a local government license pursuant to the procedures set forth in the new statute. But if WCI's license had not been wrongfully revoked by respondent, WCI would have had two years in which to obtain a permit from the ADEM under the prior regulatory regime. We submit that the appropriate remedy for the due process violation is to put WCI in the position it would have been in had the constitutional violation not occurred—allow WCI to apply for a permit from the ADEM on the basis of its 1987 landfill license. Because the Alabama courts retain "the ability to undo the effects of [the challenged] conduct" (13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.3, at 278 (2d ed. 1984)) by ordering such relief, the action is not moot. See, *e.g.*, *Garcia* v. *Lawn*, 805 F.2d 1400, 1402-1404 (9th Cir. 1986) (appeal from denial of motion to preliminarily enjoin allegedly retaliatory transfer was not mooted by termination of employee for failure to accept transfer, because court had power to order employee reinstated at original post); *Roche Prods., Inc.* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858, 865 (Fed. Cir.) (expiration of patent did not moot appeal from lower court's denial of injunctive relief, because court could fashion other relief—for example, confiscation and destruction of data generated by defendant through improper use of plaintiff's patented ingredient—to remedy the in-

fringement), cert. denied, 469 U.S. 856 (1984); *Herwald* v. *Schweiker*, 658 F.2d 359, 362 n.2 (5th Cir. Unit A 1981) (appeal from denial of motion to enjoin discharge of patient from health care facility was not mooted after discharge occurred, because court had power to order his return to the facility).

3. Finally, respondent asserts (Br. in Opp. 24-25) that WCI lacks standing to complain about the Alabama Supreme Court's determination that third parties to a land use decision have a property interest protected by the Due Process Clause. But that determination was the basis on which the Alabama court upheld the revocation of WCI's landfill license. For that reason, WCI plainly has standing to raise the issue.

Respondent insinuates that WCI is seeking to prevent citizens from expressing their views in connection with land use decisions. Nothing could be further from the truth. WCI welcomes community participation in landfill siting decisions pursuant to procedures established by state law. It does object to the misapplication of federal constitutional principles to justify the revocation of its landfill license in clear violation of the Due Process Clause.[4] The

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[4] Respondent's discussion (Br. in Opp. 26-27) of *Save Our Dunes* v. *ADEM*, 834 F.2d 984 (11th Cir. 1987), is inapposite because state-law procedural rights are irrelevant to the question whether an individual has a property right protected by the federal Due Process Clause. See Pet. 14 n.4. Respondent's attempt (Br. in Opp. 27-30) to rehabilitate the other Alabama Supreme Court decisions that contain the same error as the decision below cannot overcome the fact that those decisions indicate that due process is offended when the entire "affected citizenry" is not given prior notice of land use determinations. That was the basis for the Alabama Supreme Court's decision in the present case.

petition for a writ of certiorari should be granted to correct the Alabama Supreme Court's patently erroneous due process analysis.

Respectfully submitted.

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